FILE COPY

No. 795

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOSE DIAS DE-SOUZA, PETITIONER

v.

BRUCE G. BARBER, DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (R. 29–38) is reported at 263 F. 2d 470. The opinion of the district court (R. 15–17) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1959 (R. 39). The petition for a writ of certiorari was filed on March 24, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court properly held that an alien who had been deported in 1930 and whose order of deportation was reinstated in 1957 pursuant to § 242 (f) of the Immigration and Nationality Act of 1952 after his unlawful reentry may not now attack the prior deportation order.

2. Assuming that the prior deportation order was subject to attack, whether petitioner could challenge that order on the ground that he was 20 years old when he waived counsel at the hearing and confirmed the truth of previous admissions.

3. Assuming that the prior deportation order was subject to collateral attack, whether petitioner made an entry in 1926 when he went to Mexico for business and returned the same day.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Immigration and Nationality Act of 1952, the regulations issued pursuant thereto, and the Act of 1917, are set out in the Appendix, *infra*, pp. 12–15.

STATEMENT

Petitioner, born in Portugal on June 4, 1909, was admitted for permanent residence in the United States in either 1912 or 1916 (R. 3–4, 11, 29). On February 19, 1929, petitioner, after a plea of guilty, was sentenced to serve one to fourteen years' imprisonment for issuing a bank check with intent to defraud. He entered California State Prison at San Quentin on March 12, 1929 (R. 11). On March 14,

1929, petitioner signed a statement containing the admission that he left the United States in February, 1926, going to Mexico, and that he entered the United States at Calexico, California, on the same date, without inspection. A transcript of a "record of investigation" conducted at San Quentin on May 14, 1929, by a United States Immigration Inspector contains a similar admission (R. 29–30).

On June 7, 1929, an immigration warrant charged that petitioner had been found in the United States in violation of the Immigration Act of February 5, 1917, for the reason, among others, that he had been sentenced to "imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, to wit: Issuing bank checks with intent to defraud, committed within five years after his entry" (R. 11–12).

A hearing was held at San Quentin on October 4, 1929, at which petitioner admitted the truth of his statement made on May 14, 1929. He stated that his trips to Mexico in 1926 were in the course of his employment in a produce business, and that he "never did stay over there more than an hour and a half at any time" (R. 30). At this hearing the following colloquy occurred between the immigration inspector and the petitioner (R. 35):

> Q. You are advised that under these proceedings you have the right to be represented by counsel. Do you desire to obtain the services of a lawyer?
>
> A. No. I can handle this myself.

Q. Do you waive your right to be represented by an attorney and are you now ready and willing to proceed with this hearing?

A. Yes.

Q. You are advised that Attorney W. D. Hahesy, of Tulare, California, has stated that he wished to be present at this hearing. Is it your wish that he be present at this hearing and represent you in these proceedings?

A. No. He was not hired by me. I don't want his services whatsoever.

Q. You waive your right to the services of Attorney Hahesy?

A. Yes.

The inspector found that the charge set forth in the warrant of arrest was sustained and recommended deportation. Petitioner was deported on December 2, 1930 (R. 12).

Petitioner made three entries as a non-immigrant in 1951 and 1953. At no time prior to 1957 did he claim the right to enter the United States because of any illegality in the deportation of 1930 (R. 4, 30).

On June 29, 1957, petitioner reentered the United States at San Ysidro, California, without a visa (R. 12, 30). On August 22, 1957, a hearing was held before a special inquiry officer on an order to show cause, charging that petitioner was subject to deportation pursuant to "Section 242(f) of the Immigration and Nationality Act in that you have unlawfully reentered the United States after having been deported pursuant to an order of deportation on a ground described in any of the paragraphs enumerated in

Section 242(e) of the said Act." In accordance with 8 C.F.R. 242.22 (*infra*, pp. 14–15), it was determined that petitioner was an alien who had previously been deported, that he had been deported pursuant to a ground mentioned in § 241(a)(4) of the Immigration and Nationality Act of 1952 (*infra*, p. 13), and that he had unlawfully reentered the United States. The special inquiry officer ruled that no collateral attack could be made upon the prior deportation order and that no evidence would be received for that purpose. Petitioner was accordingly ordered deported under the previous order of deportation in accordance with § 242(f) of the Act (R. 12–13). The Board of Immigration Appeals upheld the special inquiry officer's ruling refusing to permit a collateral attack upon the prior deportation order and, on January 6, 1958, dismissed petitioner's appeal (R. 31, 4–5, 13).

Petitioner then filed in the United States District Court for the Northern District of California a petition for a writ of habeas corpus, asserting that the special inquiry officer erred in refusing to allow the introduction of evidence attacking the validity of the prior deportation order, and that the Board acted arbitrarily in dismissing the appeal (R. 3–7). The respondent filed a return (R. 11–14).

In denying the petition for a writ of habeas corpus, the district court refused to "disinter [petitioner's] first deportation order which was issued in 1930 and examine the evidence upon which it was based" (R. 15–17). On appeal (R. 18) the court of appeals unanimously affirmed (R. 29–39).

ARGUMENT

1. Petitioner contends that since the government chose to institute deportation proceedings under § 242(f) of the Immigration and Nationality Act of 1952 (*infra*, pp. 13–14), which reinstated the prior deportation order, rather than under § 241(a) of the Act (*infra*, p. 13) as a new deportation proceeding based upon the last unlawful entry, he should be permitted to make a collateral attack upon the prior deportation order (Pet. 2, 5, 6). Under § 242(f) an alien, after a prior deportation, may be subjected to a reinstatement of the previous order of deportation if the Attorney General makes the findings required by the statute and the regulations (8 C.F.R. 242.6 and 242.22, *infra*, pp. 14–15)—*i.e.*, (1) that the alien is the identical person previously deported; (2) that he has previously deported as a member of the class described in paragraph 4 of § 241 (a); and (3) that he "unlawfully reentered" the United States. It is undisputed that such findings were made in the instant case, thereby authorizing reinstatement of the previous order of deportation.

Petitioner's contention finds no support in the language of § 242(f), for all that section requires for reinstatement of the prior order is proof that the alien was in fact previously deported and had unlawfully reentered. More importantly, petitioner's contention would frustrate the sole purpose of § 242(f)—namely, to provide a summary procedure for deporting previously-deported aliens.

There is no want of substantive authority for deporting unlawfully-reentering deported aliens quite

apart from § 242(f) or the validity of the prior deportation order. The unlawful entry itself is, without more, a complete and independent ground for deportation under either § 241(a)(1) (combined with § 212(a)(20)) or § 241(a)(2). So also, a previously-deported alien is excludible under § 212(a)(17) and therefore deportable on that ground under § 241(a)(1). In no such deportation proceedings would the validity of the original deportation order be in issue. On the one hand, the unlawfulness of the entry without a visa does not depend on the legality of the earlier deportation and thus deportation for the unlawful entry would not. On the other hand, an alien excluded on the ground of a prior deportation may not then contest the validity of the prior order (*United States ex rel. Koehler* v. *Corsi*, 60 F. 2d 123 (C.A. 2)), and proof of excludibility is all that is required for deportation under § 241(a)(1).

Since § 242(f) in no way expands the substantive grounds for deportation, it is obvious that its purpose was to provide a more expeditious procedure for deporting aliens who have already had the benefit of full deportation proceedings and been deported but who unlawfully reenter the country. Petitioner, however, would read § 242(f) as a procedural boon to the unlawfully-reentering deportee, allowing him, when the Government chooses to proceed under that section rather than under § 241(a), to reopen and relitigate the original deportation order, notwithstanding that he is independently deportable under § 241(a) on the basis

of his unlawful entry alone. Not only would that interpretation make of § 242(f) a dead letter but it would also be of no aid to petitioner. Even if petitioner should prevail in this case and establish the invalidity of the 1929 order, he could still be deported under a new deportation order based solely on his unlawful entry in 1957.[3]

Orderly legal procedures require that at some stage there shall be an end to litigation and finality of judgments. That is particularly true in the instant case, where for the long period between his deportation in 1930 and his illegal re-entry in 1957, petitioner had not sought review of the deportation order or permission for entry from the Attorney General under § 212(a)(17) of the Act (*infra*, p. 12). Petitioner could have had his day in court prior to his deportation in 1930, and there is no showing that his failure to seek review of that order was other than voluntary. In these circumstances it is entirely

[3] In fact, the procedures prescribed by the regulations under § 242(f) are not at all summary, so that in practice there is little difference between "reinstatement" of the prior order under § 242(f) and entry of a new deportation order (for unlawful entry or excludability as a previously-deported alien) under § 241(a). The only substantive difference petitioner has been able to suggest—or that we know of—is that the discretionary relief of suspension of deportation (§ 244) might not be available in § 242(f) proceedings. Since petitioner admittedly would not be eligible for such relief in any event, the question whether § 242(f) has that effect is not presented by this case. On the facts here, petitioner's position is simply that, because the proceeding was styled as one under § 242(f), he cannot be deported without relitigating the 1929 order, even though he admittedly could be, on the same facts, if the proceeding had been styled as one under § 241(a).

equitable that he should be precluded from making a collateral attack upon the prior deportation order, under which he had been deported "in pursuance of law." § 101(g), *infra*, p. 12; cf. *United States ex rel. Koehler* v. *Corsi*, 60 F. 2d 123 (C.A. 2).

2. If it be assumed *arguendo* that the prior deportation proceeding was subject to collateral attack, petitioner then contends that this proceeding involved a gross miscarriage of justice, since his admissions as to entry into the United States from Mexico in February 1926 without inspection (see Statement, *supra*, p. 3) were made when he was a minor in prison and did not have counsel (Pet. 2). Upon the record before this Court there is no merit to that contention.

The first admission was made by petitioner on March 14, 1929, when he was 19 years, 9 months of age, and the second on October 4, 1929, when he was 20 years, 4 months of age (R. 35). At the deportation hearing on October 4, 1929, petitioner admitted the truth of the statement made on March 14, 1929 (R. 30). There is nothing in the record to show that petitioner, then very close to his majority, was not a competent witness. A minor may be a competent witness if he has the requisite capacity, intelligence, and understanding of the obligation of an oath. *Wheeler* v. *United States*, 159 U.S. 523, 524–525; *Doran* v. *United States*, 205 F. 2d 717 (C.A.D.C.), certiorari denied, 346 U.S. 828. And a minor's admissions against interest (such as those by petitioner) are statements which a person ordinarily does not make unless true, and are admissible in evidence against him. 4 Wigmore, *Evidence* (3d Ed.) § 1053;

Gangi v. *Fradus*, 227 N.Y. 452, 456, 125 N.E. 677, 679; *Gebhardt* v. *United Rys. Co. of St. Louis*, 220 S.W. 677, 679 (Mo. Sup.). Even now petitioner does not assert that his previous admissions as to entry without inspection in 1926 were not true.

The immigration inspector advised petitioner that he had the right to be represented by counsel if he wished, and mentioned an attorney by name who was ready to appear. Petitioner, however, unequivocally announced that he could handle the matter himself and expressly waived the right to the services of an attorney (Statement, *supra*, pp. 3–4). Even in a criminal case, it is possible for an infant accused to waive his right to counsel. Cf. *Williams* v. *Huff*, 142 F. 2d 91 (C.A.D.C.); *Curtis* v. *Hiatt*, 161 F. 2d 621 (C.A. 3).

3. Again assuming *arguendo* that the prior deportation proceeding is subject to collateral attack, petitioner asserts there was no "entry" in 1926 from Mexico into the United States (Pet. 2, 6–7).

At the hearing resulting in the 1930 deportation, petitioner testified that during the course of his duties in the produce business in Los Angeles he crossed into Mexico on numerous occasions, but "never did stay over there more than an hour and a half at any time" (R. 30.) There is, however, nothing in the record to indicate that his departure was other than voluntary or that he did not know that he was going into Mexico. In these circumstances there was an entry into the United States by petitioner from Mexico in 1926. The length of time spent abroad is immaterial in determination of the question whether there has been an entry.

United States ex rel. Claussen v. *Day*, 279 U.S. 398, 401; *United States ex rel. Stapf* v. *Corsi*, 287 U.S. 129, 132; *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 425; *Schoeps* v. *Carmichael*, 177 F. 2d 391, 396 (C.A. 9), certiorari denied, 339 U.S. 914. Having been convicted of a crime involving moral turpitude within five years after his 1926 entry, petitioner was properly deported under § 19 of the Immigration Act of 1917 (*infra*, p. 14).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1959.

APPENDIX

The Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 8 U.S.C. 1101, *et seq.*, provides in pertinent part:

SEC. 101. (g) For the purposes of this Act, any alien ordered deported (whether before or after the enactment of this Act) who has left the United States, shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.

* * * * *

SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(17) Aliens who have been arrested and deported, or who have fallen into distress and have been removed pursuant to this or any prior act, or who have been removed as alien enemies, or who have been removed at Government expense in lieu of deportation pursuant to section 242(b), unless prior to their embarkation or reembarkation at a place outside the United States or their attempt to be admitted from foreign contiguous territory the Attorney General has consented to their applying or reapplying for admission;

* * * * *

(20) Except as otherwise specifically provided in this Act, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification

card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 211(e);

* * * * * *

SEC. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

* * * * * *

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, * * *.

* * * * * *

SEC. 242.(e) Any alien against whom a final order of deportation is outstanding by reason of being a member of any of the classes described in paragraphs (4)* * * of section 241(a) * * * who shall wilfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony * * *.

(f) Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after the date of

enactment of this Act, on any ground described in any of the paragraphs enumerated in subsection (e), the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation.

* * * * * *

Section 19 of the Immigration Act of 1917, 39 Stat. 889 (8 U.S.C. (1946 Ed.) 155(a)) provided:

* * * except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported * * *.

8 C.F.R. § 242.6 provides:

Aliens deportable under section 242(f) of the act. In the case of an alien within the purview of section 242(f) of the act, the order to show cause shall charge him with deportability only under section 242(f) of the act. The prior order of deportation and evidence of the execution thereof, properly identified, shall constitute prima facie cause for deportation under that section.

8 C.F.R. § 242.22 provides:

Proceedings under section 242(f) of the act—(a) *Applicable regulations.* Except as hereafter provided in this section, all the provisions

of §§ 242.8 to 242.21, inclusive, and § 242.23 shall apply to the case of a respondent within the purview of § 242.6.

(b) *Deportability.* In determining the deportability of an alien alleged to be within the purview of § 242.6, the issues shall be limited solely to a determination of the identity of the respondent, i.e. whether the respondent is in fact an alien who was previously deported, or who departed while an order of deportation was outstanding; whether the respondent was previously deported as a member of any of the classes described in paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a) of the act; and whether respondent unlawfully reentered the United States.

(c) *Order.* If deportability as charged pursuant to § 242.6 is established, the special inquiry officer shall order that the respondent be deported under the previous order of deportation in accordance with section 242(f) of the act, or shall enter such other order as may be required for the appropriate disposition of the case.